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Gloria Falla

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UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte GLORIA FALLA and ROGER WARREN

Appeal 2009-0010¹
Application 10/611,682
Technology Center 3700

Decided:² March 13, 2009

Before DEMETRA J. MILLS, ERIC GRIMES, and FRANCISCO C.
PRATS, *Administrative Patent Judges*.

PRATS, *Administrative Patent Judge*.

¹ Sara Lee Corporation is the real party in interest.

² The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a method of forming an undergarment. The Examiner has rejected the claims as anticipated and obvious. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

STATEMENT OF THE CASE

Claims 1-23 are pending and on appeal (App. Br. 2).³ Claims 1, 14, and 19, the appealed independent claims, are representative and read as follows:

1. A method of forming an undergarment comprising:
inserting an adhesive layer between a first fabric layer and a second fabric layer to form a fabric sub-assembly, said sub-assembly having a periphery that is larger than an entire outer periphery of the undergarment;
causing said adhesive layer to form a laminate from said sub-assembly; and
removing a trim from said laminate at said entire outer periphery to form a finished edge of the undergarment, wherein said first and second fabric layers include a blend of cotton-based material.

14. A method of forming an undergarment comprising:
applying an adhesive layer to a first fabric layer, said first fabric layer being a first cotton blend fabric;
overlying said adhesive layer with a second fabric layer, said second fabric layer being a second cotton blend fabric;
causing said adhesive layer to bond said first and second fabric layers together to form a stretchable laminate, said

³ Appeal Brief filed January 31, 2006. While the Appeal Brief lists claims 12, 13, and 18 as being appealed (App. Br. 2), and the Final Rejection lists claims 12, 13, and 18 among those rejected (Final Rejection 1), claims 12, 13, and 18 do not appear to be listed in any specific ground of rejection in either the Examiner's Answer or Final Rejection.

stretchable laminate having a periphery that is larger than an entire outer periphery of the undergarment; and
cutting said stretchable laminate along said entire outer periphery to form a finished edge of the undergarment that resists unraveling.

19. A method of forming an undergarment comprising:
forming an adhesive layer having an adhesive free region;
surrounding said adhesive layer with a first fabric layer and a second fabric layer;
causing said adhesive layer to bond said first and second fabric layers together to form a stretchable laminate, said stretchable laminate having a periphery that is larger than an entire outer periphery of the undergarment; and
cutting said stretchable laminate along said entire outer periphery to form a finished edge of the undergarment that resists unraveling, wherein said adhesive layer is a layer of thermally actuated polyethylene and ethylene vinyl acetate copolymer.

The Examiner cites the following documents as evidence of unpatentability:

Bracht	US 2,915,067	Dec. 1, 1959
Gluckin	US 5,154,659	Oct. 13, 1992
Burr	US 5,820,443	Oct. 13, 1998

The following rejections are before us for review:

Claims 1, 4-7, 9, 14, 16, and 17 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Gluckin (Ans. 4-5).⁴

Claims 8, 15, and 19-23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Gluckin in view of Bracht (Ans. 6).

⁴ Examiner's Answer mailed July 24, 2007.

Claims 2 and 3 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Gluckin (Ans. 6-7).

Claims 10 and 11 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Gluckin in view of Burr (Ans. 7).

ANTICIPATION

ISSUE

The Examiner cites Gluckin as disclosing a method of preparing an undergarment having the claimed steps of inserting an adhesive layer between first and second fabric layers to form a subassembly, causing the adhesive layer to form a laminate, and removing trim from the outer periphery to form a finished edge (Ans. 4-5). The Examiner contends that Gluckin meets the limitation in claim 1 requiring the sub-assembly to have a periphery that is larger than an entire outer periphery of the undergarment because “the garment structure shown in figure 15 is ‘an’ ‘entire outer periphery of the undergarment’ as broadly claimed since it has an outer periphery and is a structure that is shown as being worn under a garment” (*id.* at 5).

Appellants contend that Gluckin does not meet the limitation in independent claims 1, 14, and 19 requiring the “subassembly” or “stretchable laminate” to have “a periphery that is larger than an entire outer periphery of the undergarment” because “Gluckin discloses a brassiere 60 having right and left side panels 70, 72 that are sewn together by a center seam 74 as seen in Figure 2” (App. Br. 4). Thus, Appellants argue, “Gluckin merely discloses a three layer fused laminate 100 that is larger than the right . . . side panel 70 or the left side panel 72, where these panels are joined by a center seam 74” (*id.*). Accordingly, Appellants urge, “the laminate 100 of

Gluckin[] that is only larger than the left or right side panel does not disclose or suggest the ‘sub-assembly’ or ‘stretchable laminate’ that has a periphery larger than the entire outer periphery of the undergarment as required by claims 1, 14, and 19” (*id.*).

The Examiner responds that the “garment of Gluckin is an undergarment whether it is a full, half or partial undergarment as broadly claimed since an undergarment is a garment that is worn under another outer garment” (Ans. 8). Moreover, the Examiner contends, because the limitation at issue recites that the sub-assembly or stretchable laminate has “a periphery that is larger than ‘*an*’ entire outer periphery of the undergarment” (emphasis added), as opposed to reciting a periphery that is larger than *the* “entire outer periphery of the undergarment,” the claims are sufficiently broad to encompass Gluckin’s process, since the periphery of Gluckin’s half-brassiere blanks is larger than the periphery of the portion of the garment ultimately worn by the consumer (*id.* at 8).

Appellants reply that “the interpretation of . . . ‘an undergarment’ to be anticipated by a half or partial undergarment is simply not a reasonable interpretation of this element and is not consistent with the interpretation that those skilled in the art would reach” (Reply Br. 2).

In view of the positions advanced respectively by Appellants and the Examiner, the issue with respect to this rejection is whether the Examiner erred in finding that Gluckin meets the limitation in independent claims 1 and 14 requiring formation of a sub-assembly (claim 1) or a stretchable laminate (claim 14) that has “a periphery that is larger than an entire outer periphery of the undergarment.”

FINDINGS OF FACT (“FF”)

1. Gluckin discloses “an improved shape-supported molded brassiere cup that uses moldable and also non-moldable construction materials the latter non-moldable fabric material being, in a preferred embodiment, light weight stretchable cotton and, as such, contributing significantly to the comfort in wearing the garment” (Gluckin, col. 1, ll. 6-11).

2. Gluckin discloses that the process of making its brassieres includes the following steps of preparing a laminate that has two layers of material surrounding an adhesive layer:

As best seen in FIG. 3, a supply of laminated material is produced by heat fusing a non-plastic content fabric **78** to a heat sensitive polyester plastic-fill **80** by passage between the nip of opposed heated rollers **82**. Any appropriate heating apparatus or heat-sealer, may be used for this purpose The fabric **28** will be understood to be of conventional construction, namely interwoven fibers, such as a cotton tricot, and thus essentially non-fusible. However, the partial melting of the plastic film **80** and the pressing thereof into the interstices of the cotton fabric **78** results in an attachment of the film **80** to the fabric **76**. The lamination **78, 80** is then conveyed into a shearing station **84** and is die cut into rectangular work-in-process blanks **86**. Blanks **86** are sized so as to be slightly larger than a prior art side panel **22, 24** and underbreast panel **26, 28** combination. The height of blank **86** is also sized to be larger than a prior art cup **14, 16** with a patch **38** and underbreast panel **26, 28** combination.

(Gluckin, col. 3, ll. 9-29.)

3. Gluckin discloses that a cutting die is used to impart decorative shapes to the laminated fabric blanks (Gluckin, col. 3, ll. 30-32), followed by forming the cup shape into the blanks (*id.* at col. 3, l. 39, through col. 4, l. 4).

4. Gluckin discloses that, once a laminated blank, shaped as a right breast support, receives its finished trimmed outline, it “is attached by seam **74** to an identically constructed and developed left cup and side panel **72** of brassiere **60**” (Gluckin, col. 4, ll. 11-13).

5. Gluckin does not disclose using a single laminated fabric blank as the entire structure of one of its brassieres.

PRINCIPLES OF LAW

“To anticipate a claim, a prior art reference must disclose every limitation of the claimed invention, either explicitly or inherently.” *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997). During examination, the PTO must interpret terms in a claim using “the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant’s specification.” *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

ANALYSIS

We agree with Appellants that the Examiner erred in finding that Gluckin meets the limitation in independent claims 1 and 14 requiring formation of a sub-assembly (claim 1) or a stretchable laminate (claim 14) that has “a periphery that is larger than an entire outer periphery of the undergarment.”

We note that Gluckin’s brassiere-forming process includes the claimed steps of preparing a laminate that has two fabric layers surrounding an adhesive layer (FF 2). However, as Appellants point out, Gluckin only discloses that those laminate blanks are formed into individual half-brassiere

cup portions, and then attached together at a central seam to form the final brassiere (FF 4). Gluckin does not disclose using a single laminated fabric blank as the entire structure of a brassiere (FF 5).

Thus, because Gluckin only uses half-bra laminated fabric blanks to prepare its brassieres, none of Gluckin's laminated fabric blanks can possibly have "a periphery that is larger than an entire outer periphery of the undergarment" as recited in claims 1 and 14, unless a person of ordinary skill in the art would interpret "undergarment" as encompassing a half-brassiere.

We do not agree with the Examiner that a person of ordinary skill in the art would consider a half-brassiere to be an undergarment. While it may be true that the half-brassiere structures of Gluckin are ultimately worn under another garment, the Examiner has provided no evidence suggesting that a person of ordinary skill in the art would consider a portion of an article to be a "garment," or for that matter an "undergarment," simply because it is part of a larger article worn on the body.

For example, a dress shirt can have sleeves and a breast pocket, all of which are worn on the body. However, in our view, a person of ordinary skill in the art would not consider sleeves or pockets to be "garments." In the same way, we cannot agree with the Examiner that a person of ordinary skill in the art would consider a half-brassiere to be an "undergarment."

Thus, because the half-brassiere fabric laminate blanks of Gluckin do not have an outer periphery larger than an outer periphery of the brassieres ultimately produced by Gluckin's process, we agree with Appellants that Gluckin does not meet the limitation in claims 1 and 14 requiring the step of forming a sub-assembly (claim 1) or a stretchable laminate (claim 14) that

has “a periphery that is larger than an entire outer periphery of the undergarment.” We therefore reverse the Examiner’s rejection of claims 1 and 14, and their dependent claims 4-7, 9, 16, and 17 as being anticipated by Gluckin.

OBVIOUSNESS -- GLUCKIN

Claims 2 and 3 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Gluckin (Ans. 6-7). The Examiner contends that a person of ordinary skill in the art would have considered it obvious to provide Gluckin’s garment with the cotton blends recited in claims 2 and 3 (*id.*).

Each of claims 2 and 3 depends from claim 1, and incorporates the limitations of claim 1. “[O]bviousness requires a suggestion of all limitations in a claim.” *CFMT, Inc. v. Yieldup Int’l Corp.*, 349 F.3d 1333, 1342 (Fed. Cir. 2003) (citing *In re Royka*, 490 F.2d 981, 985 (CCPA 1974)).

Even assuming for arguments’ sake that the use of the fabrics recited in claims 2 and 3 would have been obvious to an ordinary artisan, the Examiner has not explained why the artisan would have been prompted to modify Gluckin’s teachings and prepare an undergarment by a process that includes a step of making a “sub-assembly having a periphery that is larger than an entire outer periphery of the undergarment” as recited in claim 1. Thus, because the Examiner has not adequately explained why Gluckin meets all of the limitations in claims 2 and 3, we are compelled to reverse the Examiner’s rejection of those claims as being obvious over Gluckin.

OBVIOUSNESS -- GLUCKIN AND BRACHT

Claims 8, 15, and 19-23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Gluckin in view of Bracht (Ans. 6). The Examiner contends that a person of ordinary skill in the art would have considered it

obvious to use Bracht's polyethylene and ethylene vinyl acetate copolymer as the fusible adhesive material in the fabric laminate of Gluckin's garment (*id.*).

Claim 8 depends from claim 1, and claim 15 depends from claim 14. Claims 8 and 15 incorporate the limitations of claims 1 and 14, respectively.

Even assuming for arguments' sake that it would have been obvious to an ordinary artisan to use Bracht's fusible adhesive in Gluckin's laminate, the Examiner has not explained why the cited references would have prompted the artisan to modify Gluckin's teachings and prepare an undergarment by a process that includes a step of making a sub-assembly (claim 1) or a stretchable laminate (claim 14) having "a periphery that is larger than an entire outer periphery of the undergarment" as recited in claims 1 and 14. Thus, because the Examiner has not adequately explained why the cited references meet all of the limitations in claims 8 and 15, we are compelled to reverse the Examiner's rejection of those claims as being obvious over Gluckin and Bracht.

Like claim 14, claim 19 recites a step of preparing a "stretchable laminate having a periphery that is larger than an entire outer periphery of the undergarment." As discussed above, we find that the Examiner has not explained why the cited references teach or suggest that limitation. We therefore reverse the Examiner's rejection of claim 19, and its dependent claims 20-23, as being obvious over Gluckin and Bracht.

OBVIOUSNESS -- GLUCKIN AND BURR

Claims 10 and 11 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Gluckin in view of Burr (Ans. 7). The Examiner contends that a person of ordinary skill in the art would have considered it obvious to

use Burr's gore reinforcement fabric "to provide extra support at the central area" of Gluckin's brassiere (*id.*).

Claims 10 and 11 depend ultimately or directly from claim 1, and incorporate the limitations of claim 1.

Even assuming for arguments' sake that it would have been obvious to an ordinary artisan to use Burr's gore reinforcement fabric in Gluckin's brassiere, the Examiner has not explained why the cited references would have prompted the artisan to modify Gluckin's teachings and prepare an undergarment by a process that includes the step of making a sub-assembly having "a periphery that is larger than an entire outer periphery of the undergarment" as recited in claim 1. Thus, because the Examiner has not adequately explained why the cited references meet all of the limitations in claims 10 and 11, we are compelled to reverse the Examiner's rejection of those claims as being obvious over Gluckin and Burr.

SUMMARY

We reverse the Examiner's rejection of claims 1, 4-7, 9, 14, 16, and 17 under 35 U.S.C. § 102(b) as being anticipated by Gluckin.

We reverse the Examiner's rejection of claims 8, 15, and 19-23 under 35 U.S.C. § 103(a) as being unpatentable over Gluckin in view of Bracht.

We reverse the Examiner's rejection of claims 2 and 3 under 35 U.S.C. § 103(a) as being unpatentable over Gluckin.

We reverse the Examiner's rejection of claims 10 and 11 under 35 U.S.C. § 103(a) as being unpatentable over Gluckin in view of Burr.

REVERSED

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